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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL STERLING DAY,

Defendant and Appellant.

H043843

(Santa Cruz County

Super. Ct. Nos. F28717, F28743)

Defendant Michael Sterling Day was sentenced to state prison after pleading guilty to two counts of possessing methamphetamine for sale. For each conviction, the trial court imposed a Health and Safety Code section 11372.5 “criminal laboratory analysis fee” as well as penalty assessments. We affirmed defendant’s convictions in a separate appeal after defendant’s appellate counsel filed a brief citing *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). (*People v. Day* (Dec. 20, 2016, H043232).) Defendant filed the instant appeal after the trial court denied his postjudgment request to strike the penalty assessments imposed on the Health and Safety Code section 11372.5 levy. (Pen. Code, § 1237.2.) Defendant argues that the \$50 levy imposed under Health and Safety Code section 11372.5 is a fee rather than a fine or penalty, meaning that it is not subject to penalty assessments. For the reasons stated here, we will affirm the judgment.

## **I. TRIAL COURT PROCEEDINGS**

Because the facts of defendant's convictions are irrelevant to the issue raised on appeal, we summarize only the procedural history of the case. Defendant was charged in two cases with a total of two counts of possessing methamphetamine for sale. (Health & Saf. Code, § 11378; unspecified statutory references are to this Code.) Each complaint alleged five prior prison terms (Pen. Code, § 667.5, subd. (b)) and one prior strike conviction (Pen. Code, § 667, subds. (b)–(i)).

Defendant pleaded guilty to the charges and admitted the special allegations. At sentencing, the trial court dismissed the prior strike conviction allegation (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497) and struck all but two of the prior prison term allegations. The court sentenced defendant to four years, eight months in state prison. For each case, the trial court imposed a \$50 “Lab Fee” (citing § 11372.5, subd. (a)) and \$155 in what we will refer to collectively as penalty assessments.

Defendant appealed his sentence in case No. H043232. While that appeal was pending, defendant's appellate counsel asked the trial court to strike the penalty assessments imposed on the \$50 section 11372.5 levy. After the trial court denied that request, defendant filed a new notice of appeal, which led to the instant case. After filing the second notice of appeal, defendant's appellate counsel filed a *Wende* brief in case No. H043232, and did not reference this second appeal in that brief. We filed an opinion in case No. H043232, affirming the judgment after finding no arguable issues. (*People v. Day* (Dec. 20, 2016, H043232).)

## **II. DISCUSSION**

### **A. TIMELINESS AND REVIEWABILITY**

The People argue we “impliedly considered and rejected” defendant's argument about section 11372.5 when we affirmed the judgment in case No. H043232. The People suggest that by filing a *Wende* brief in case No. H043232 after learning that the trial court

had denied the request to strike the penalty assessments, defendant forfeited any challenge to those assessments.

Defendant responds that his argument about section 11372.5 was separately appealable under Penal Code section 1237.2, which provides: “An appeal may not be taken by the defendant from a judgment of conviction on the ground of an error in the imposition or calculation of fines, penalty assessments, [etc.] ... unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction in the trial court, which may be made informally in writing.” Defendant argues he had to separately file and prosecute the issue to prevent the risk of forfeiture. He compares the instant procedural posture to an appeal from a postjudgment order awarding victim restitution, noting that a defendant must separately appeal such a postjudgment order. (Citing *People v. Denham* (2014) 222 Cal.App.4th 1210, 1214.)

Defendant prudently filed a separate notice of appeal to preserve the section 11372.5 issue. But he risked forfeiting that issue by not requesting consolidation of this case with case No. H043232 (or at least mentioning the section 11372.5 issue in his *Wende* brief). We will nonetheless consider the merits of the issue because the second appeal is timely and we did not expressly decide the issue in our previous opinion.

#### **B. PENALTY ASSESSMENTS APPLY TO SECTION 11372.5**

Section 11372.5, subdivision (a) provides: “Every person who is convicted of [specified drug-related offenses] shall pay a criminal laboratory analysis fee in the amount of fifty dollars (\$50) for each separate offense. The court shall increase the total fine necessary to include this increment. [¶] With respect to those offenses specified in this subdivision for which a fine is not authorized by other provisions of law, the court shall, upon conviction, impose a fine in an amount not to exceed fifty dollars (\$50), which shall constitute the increment prescribed by this section and which shall be in addition to any other penalty prescribed by law.” The parties’ dispute turns on whether

the \$50 levied under section 11372.5, subdivision (a) for each offense is a fee rather than a fine or penalty. We review issues of statutory interpretation de novo.

The penalty assessments imposed here apply to fines and penalties, but not to fees. (E.g., Pen. Code, § 1464, subd. (a)(1) [“[T]here shall be levied a state penalty in the amount of ten dollars (\$10) for every ten dollars (\$10), or part of ten dollars (\$10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses.”].) If the \$50 levy is a fee, penalty assessments would be improper. The parties note a split of authority on the subject, with a recent case—*People v. Watts* (2016) 2 Cal.App.5th 223 (*Watts*)—determining that section 11372.5 involves a fee. We will summarize *Watts* as well as a more recent case that disagrees with it—*People v. Moore* (2017) 12 Cal.App.5th 558 (*Moore*)—and then explain why we agree with *Moore* and the weight of published authority that the section 11372.5 levy is a fine or penalty.

### **1. *People v. Watts***

*Watts* involved a challenge to the imposition of penalty assessments on a section 11372.5 levy. (*Watts, supra*, 2 Cal.App.5th at p. 226.) The court noted there are three types of monetary charges imposed on criminal defendants: fines and penalties that are intended to punish defendants; fees meant to pay for government programs or administrative costs; and penalty assessments that inflate fines and penalties by percentage increments. (*Id.* at p. 228.) The court noted an “internal inconsistency” in the language of section 11372.5, subdivision (a); the first paragraph refers to the levy as a fee, but the second paragraph characterizes it as a fine. (*Watts*, at p. 231.) The *Watts* court determined that the fee characterization in the first paragraph should control because the second paragraph applies “only to offenses ‘for which a fine is not authorized by other provisions of law’ ” and “there are currently no such offenses,” meaning the second paragraph describes a “null set.” (*Id.* at pp. 234, 236.) The *Watts* court also reasoned that the levy is not punitive because it is a fixed amount that is imposed to defray administrative costs. (*Id.* at p. 235.) The court concluded that “the most sensible

interpretation is that the Legislature intended the crime-lab fee to be exactly what it called it in the first paragraph, a fee, and not a fine, penalty, or forfeiture subject to penalty assessments.” (*Id.* at p. 231.) More recently, another division of the First District agreed with *Watts* and concluded that because the “criminal laboratory analysis fee and drug program fee are nonpunitive, the trial court erred by imposing penalty assessments on those fees.” (*People v. Webb* (2017) 13 Cal.App.5th 486, 499.)

## **2. *People v. Moore***

*Moore* involved the Court of Appeal’s reversal of a published decision by the Appellate Division of the Nevada County Superior Court that had determined the section 11372.5 levy was a fee. (*Moore, supra*, 12 Cal.App.5th at p. 560.) The *Moore* court noted that section 11372.5, subdivision (a) uses four different terms to refer to the same levy: fee, fine, increment, and penalty. (*Moore*, at p. 563.) The court reasoned that the levy has the “dual purposes of a fee and a fine” because section 11372.5, subdivision (b) discusses placing funds in a criminalistics laboratories fund (consistent with a fee) but subdivision (c) of that section requires any surplus funds to be distributed “ ‘in accordance with the allocation scheme for distribution of fines and forfeitures set forth in Section 11502’ ” (consistent with a fine). (*Moore*, at p. 565.) Interpreting the levy as a fine was consistent with the statutory language because the levy “is described as a component of the total fine, indicating it is itself a fine.” (*Ibid.*) The court noted that section 11372.5, subdivision (a) states that the levy is to be imposed “ ‘in addition to any other penalty,’ ” meaning that “the subdivision equates the levy with other *penalties*.” (*Moore*, at p. 565.) The *Moore* court based its interpretation in part on the California Supreme Court’s decision in *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1157 (*Talibdeen*), which held that penalty assessments under Penal Code section 1464 and Government Code section 76000 are mandatory and affirmed the application of penalty assessments to a section 11372.5 levy. (*Moore*, at p. 566.) Interpreting the levy as a fine was also consistent with intermediate appellate decisions dating back to 1998. (*Id.* at

pp. 566–567; citing *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1520 (*Martinez*).) The *Moore* court observed that, despite those longstanding judicial interpretations, the Legislature has never taken action to abrogate them. (*Moore*, at p. 571.)

Disagreeing with the conclusion in *Watts*, *Moore* reasoned that *Watts* “too easily dismisses the second paragraph of section 11372.5, subdivision (a)” and essentially rendered that paragraph surplusage. (*Moore, supra*, 12 Cal.App.5th at pp. 569–570.) The *Moore* court’s conclusion that the levy is a fine interprets “all of subdivision (a) to be in harmony with a purpose to impose a fine or penalty,” meaning “there is no language in the subdivision that serves as a mere nullity.” (*Ibid.*) The *Moore* court concluded that, “based on the language of the statute as a whole, the aim to avoid rendering any part of the section mere surplusage, the weight of the case authority including consistent California Supreme Court authority, and the fact the Legislature has not amended the statute to diverge from the holdings in those cases, ... the levy constitutes a fine or penalty.” (*Id.* at p. 565.) A later Court of Appeal decision disagreed with *Watts* and reached the same conclusion as *Moore*. (*People v. Alford* (2017) 12 Cal.App.5th 964, 967, fn. 2, review granted Sept. 13, 2017, S243340 (*Alford*).)

### **3. The Penalty Assessments Were Proper**

Defendant urges us to follow *Watts* and determine that the section 11372.5 levy is a fee upon which penalty assessments cannot be imposed. But we are persuaded by the *Moore* court’s analysis, as well as that of other appellate courts that have reached the same conclusion. (See *Martinez, supra*, 65 Cal.App.4th at p. 1520; *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1257; *People v. Turner* (2002) 96 Cal.App.4th 1409, 1413–1414; *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1251–1252; *People v. Sharret* (2011) 191 Cal.App.4th 859, 869; *Alford, supra*, 12 Cal.App.5th at pp. 974–977.) And as the *Moore* court noted, interpreting the section 11372.5 levy as a fee would be inconsistent with the outcome in *Talibdeen*, where the Supreme Court affirmed the Court of Appeal’s decision to add penalty assessments to a section 11372.5 levy. (*Talibdeen*,

*supra*, 27 Cal.4th at pp. 1153–1154, 1157.) Though the court in *Talibdeen* did not determine the precise issue presented here, the Court of Appeal decision that the Supreme Court affirmed would be incorrect if the section 11372.5 levy were a fee rather than a fine or penalty upon which penalty assessments could be based. The penalty assessments were properly imposed here.

### **III. DISPOSITION**

The judgment is affirmed.

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Grover, J.

**WE CONCUR:**

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Rushing, P. J.

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Premo, J.